Section 1 of the act of assembly approved March 12, 1908 (Acts Assem. 1908, p. 275, c. 189), declares, that "all mixtures, preparations and liquids which will produce intoxication shall be deemed ardent spirits, within the meaning of this act."

If, therefore, the term "ardent spirits" had been used in the indictment, there would have been room to contend (though we do not here decide) that the charge would have been supported by the proof of sale of any mixture, preparation, or liquid which would produce intoxication. But while all spirituous liquors are intoxicating, and all intoxicating liquors are by force of the statute ardent spirits, it is certain that all ardent spirits are not spirituous liquors. Malt liquors, for instance, are intoxicating, but cannot be classified as spirituous. 17 A. & E. Enc. L. 203; State *v.* Oliver, 26 W. Va. 422, 53 Am. Rep. 79; Commonwealth *v.* Livermore, 4 Gray (Mass.) 20; Feldham *v.* Morrison, 1 Ill. App. 460.

We are of opinion that the indictment does not warrant proof of the sale of cider.

It follows that the judgment of the circuit court must be reversed, and the cause remanded, for further proceedings to be had therein not in conflict with this opinion.

Reversed.

Note.

See annotation to case of Com. *v.* Goodwin, ante, p. 285.

City of Richmond *v.* Mason.

June 10, 1909.

[65 S. E. 8.]

1. **Municipal Corporations (§ 764*)—Streets—Duty to Keep Safe.**—While a municipal corporation is bound to exercise due care to keep its streets and sidewalks reasonably safe for persons exercising ordinary prudence, it is not required to have them so constructed as to secure absolute immunity from danger in using them, nor is it bound to employ the utmost care to that end.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1616; Dec. Dig. § 764.* 12 Va.-W. Va. Enc. Dig. 901.]

2. **Municipal Corporations (§ 821*)—Defective Streets—Liability for Injuries—Negligence.**—A municipal corporation is liable for injuries from a defect in a street only where it has been negligent in caring for the street; what constitutes negligence in a particular case being a mixed question of law and fact.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1747-1749; Dec. Dig. § 821.* 12 Va.-W. Va. Enc. Dig. 901; 10 Id. 414.]

3. Municipal Corporations (§ 763*)—Defective Streets—Annexed Territory—Reasonable Time to Render Safe.—Where a territory is annexed to a city, the city has a reasonable time in which to render the streets therein reasonably safe for travel before it can be held liable for injuries from defects therein.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1615; Dec. Dig. § 763.* 12 Va. W. Va. Enc. Dig. 905, et seq.]

4. Municipal Corporations (§ 818*)—Defective Streets—Actions for Injuries—Admissibility of Evidence.—In an action against a city for injuries from a defect in a street in territory which had recently been annexed to the city, on the question whether the city at the time of the injury had had a reasonable time in which to render the streets safe so as to render it negligent in failing to do so, evidence was admissible showing the extent of the streets in the annexed territory, their wretched condition when annexed, lack of facilities for lighting, and the practical impossibility for various reasons of repairing and lighting the streets between the time of annexation and the time of accident.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 818.* 12 Va.-W. Va. Enc. Dig. 905, et seq.]

Error to Law and Equity Court of City of Richmond.

Action by Bridget Mason against the City of Richmond. Judgment for plaintiff, and defendant brings error. Reversed.

H. R. Pollard and *Geo. Wayne Anderson,* for plaintiff in error.
P. H. C. Cabell and *Robert H. Talley,* for defendant in error.

KEITH, P. Mrs. Mason instituted her suit in the law and equity court of the city of Richmond to recover damages for an injury sustained by her by stepping into a trench or hole in the roadbed at the point of intersection of N and Thirty-Second streets on the 14th of May, 1907. She recovered a judgment for $1,500, and the case is before us upon a writ of error.

In the course of the trial the city offered witnesses to prove that "it had used reasonable care to place the streets in the annexed territory (the point at which the accident happened having been in the annexed territory) in a reasonable safe condition; that previous to the recent annexation of territory shown in plaintiff's evidence the city had under its care 116 miles of streets, and that by the annexation about 90 miles of streets

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

had been placed under the care of the city; that these 90 miles had been previously in the county of Henrico, and were in a wretched condition for travel; that it was practically impossible between the time of annexation, which occured on December 6, 1906, and the time of the accident May 14, 1907, to have so repaired and lighted the streets in said territory as to put them in the same condition of safety as the streets in the old territory of the city; that in view of the charge made in one count of the plaintiff's declaration, namely, that the city was negligent in the matter of lighting the street at the point where the accident happened, it was proposed to show that it was practically impossible within the time during which the city had had charge of the annexed territory to erect and install a system of lighting, either gas or electricity, which would have adequately lighted the streets in the annexed territory; that in the old territory there were in use approximately 900 gas lamps and 695 electric lights; that to equally well light the annexed territory it would be necessary to install therein 574 gas lamps and lay 74 miles of gas mains at an aggregate cost of $105,000; and that 443 electric lights would be necessary, at a cost of $40,000. It was further proposed to introduce an ordinance approved January 21, 1907, in order to show that the city had promptly assumed its responsibility in the annexed territory, and had exercised its option in the matter of making a bond issue of a sum equal to 12 per centum of the assessed value of the real estate within the annexed territory for the purpose of making public improvements therein." It was also proposed to introduce the city engineer, "by whom it would be shown that his department, having charge of the improvement of the streets, had acted promptly and energetically in the matter of repairing and improving the streets in the annexed territory; that, before the introduction of gas mains along the streets of the city, it was necessary by a proper survey of the territory to prepare profiles of grades of the streets therein; that such surveys and maps were essential to ascertain the watersheds, and, after the making of the surveys and maps it would necessarily require time for proper deliberation and study to fix the extent of the watershed in each particular locality; that, until such surveys, maps, and profiles were made, grades could not be established, and, until grades were established, gas mains could not be laid in the streets; that it was a physical impossibility for the city between the time of the annexation and the happening of the accident to have placed the streets in the annexed territory in as safe a condition for the use of the public as the streets were within the old territory of the city. But the plaintiff still objected to the evidence of the witness, and

also objected to the introduction of the proposed evidence on the ground that the same was irrelevant and improper, and the court sustained the plaintiff's objection to the evidence, and refused to allow the same to be introduced, to which action of the court in refusing to allow the same to be introduced" the defendant excepted, and filed its bill of exceptions. And this constitutes the first assignment of error.

It is settled law that a municipal corporation is bound to exercise due and proper care to see that its streets and sidewalks are reasonably safe for persons exercising ordinary care and prudence; but the law does not require a municipal corporation to respond in damages for every injury that may be received on a public street. The corporation is not required to have its streets or sidewalks so constructed as to secure absolute immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. 2 Dillon on Mun. Corp. § 1006.

In 28 Cyc., p. 1358, the law is thus stated: "Where a municipality is chargeable with notice or knowledge of defects or obstructions, the general municipal duty to exercise ordinary care to keep its streets in a reasonably safe condition is continuing and constant. Its liability is for negligence, however, and for negligence only. It is not liable for damages for every accident that may occur within its limits. It is not an insurer against all defects or obstructions in its streets, and is not required or expected to do everything that human energy or ingenuity can do to prevent injury to the citizen; but its duty is to exercise reasonable care, and only this degree of care, to make and maintain its streets and walks reasonably safe for the purposes to which such respective parts are devoted, and for the use of persons traveling thereon in the usual modes by day or by night, and who are themselves in the exercise of reasonable care, whether the defect or condition causing the injury was created by the municipality itself or was created by some third person or by natural causes, and should in the exercise of ordinary care have been discovered and repaired. After it has notice, either express or implied, of the existence of defects or obstructions, no matter how they were caused, the obligation immediately arises to exercise reasonable care to restore the street, that it may again be reasonably safe for ordinary travel. In determining whether the corporation is exercising reasonable care in the performance of its duty to make and maintain its streets reasonably safe, each case must depend upon its own surrounding circumstances. The care must be reasonable and commensurate with the danger."

Had this accident occurred on the 5th of December, 1906, de-

fendant in error would have been without any remedy whatsoever, for the county of Henrico would not have been responsible to her in an action for damages by reason of an injury sustained on one of its defective highways. If the view of the trial court be correct, the city of Richmond become liable eo instante that the annexation of this territory was consummated; so that on the 7th day of December, 1906, the city became responsible to all persons for defects in the sidewalks and streets in the annexed territory, and for any injury sustained by reason of the fact that this territory had not been properly lighted. Such a conclusion would, we think, be generally rejected as shocking to the sense of justice. But, if it be not true, then it necessarily follows that the city only becomes negligent after a reasonable time has elapsed within which its duty to make its streets and sidewalks reasonably safe could have been performed; and, if that be true, then it becomes a fact to be ascertained by the jury upon proper evidence and proper instructions as to the law bearing upon the evidence.

We have found no case which treats of what constitutes a reasonable time within which a city shall render streets, sidewalks, and highways in an annexed territory reasonably safe for travel; but there are cases which seem to illustrate the underlying principle common to them and to the case under consideration.

Where there has been a heavy fall of snow which obstructs all the streets of the city, where it has been in part removed and a thaw sets in followed by a freeze, and in numerous other cases, the courts have held that a municipality cannot be charged with negligence because its sidewalks had by such causes been rendered dangerous.

In Taylor *v.* Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492, it is said: "A municipal corporation is bound to keep its sidewalks safe and convenient for the passage of the public, so far as reasonable diligence and the possession of adequate resources will allow; and the application of this rule to conditions resulting from the rigors and changes of a northern winter, and to two emergencies which frequently occur, was very fairly and justly discussed and limited. It often happens that in a single day or night every street and sidewalk in a city or village is covered with a heavy fall of snow. It is not expected and cannot be required that the corporation shall itself forthwith employ laborers to clean all the walks, and so accomplish the object by a slow and expensive process, when the result may be effected more swiftly and easily by imposing that duty upon the citizens. Each can promptly and without unreasonable burden clean the snow from his own premises, and the authorities may justly

and lawfully require that to be done under the jurisdiction conferred by their charters. But, though the municipality makes the necessary regulation, it is not thereby relieved from responsibility. The duty remains, and it must, therefore, see to it that its ordinance is obeyed. It is entitled, however, to a reasonable time within which to perform the duty in the manner permitted, and is not guilty of negligence, if observing that the work is being generally done, it awaits for a reasonable period the action of the citizens. But, when such reasonable time has been given, the corporation must compel the adjoining owners or occupants to act, or do the work itself, and if it suffers the obstruction to remain thereafter, with notice, actual or constructive, of its existence, it may become responsible for injuries resulting. * * * When the streets have been wholly or partially cleaned, it often happens that a fall of rain or the melting of adjoining snow is suddenly followed by severe cold, which covers everything with a film or layer of ice, and makes the walks slippery and dangerous. This frozen surface it is practically impossible to remove until a thaw comes which remedies the evil. The municipality is not negligent for awaiting that result." Rogers *v.* City of Rome, 96 App. Div. 427, 89 N. Y. Supp. 130; Moran *v.* City of New York, 98 App. Div. 301, 90 N. Y. Supp. 596.

There is no analogy between the facts of the cases cited and that under consideration, but they decide that the municipality is only liable for negligence, and that what constitutes negligence is a mixed question of fact and law, varying with the circumstances of each particular case, and that the municipality can only be held liable for negligence where it has failed to do that which it could reasonably be required to do, regard being had to all the circumstances by which it was surrounded.

Counsel for defendant in error say that the defect in the highway which caused the injury to her was of so trifling a character that it could have been repaired by placing a few bushels of earth in the hold or ditch into which she fell.

This is true of almost all accidents due to defects in streets and highways. Each defect in itself is trifling, and its removal or repair would involve small expense; but the application of this reasoning to each particular case would render the municipality liable in all. The officials of the city charged with the duty of repairing and lighting its streets and highways must consider the duty before them in its entirety as requiring the fixing of grades and laying of pipes and mains and the construction of sewers in accordance with a general plan of system; and could not single out this or that defect as the subject of their special care.

We are of opinion that the evidence excluded should have

been admitted, to the end that the jury under proper instructions might have considered and decided whether or not the city of Richmond was under all the circumstances guilty of negligence in failing to render safe the roadway at the point where the injury was received.

The second assignment of error is to the refusal of the court to give an instruction which raises the same question as that which we have disposed of in dealing with the first bill of exceptions.

The case must, for the reasons already given, be reversed and remanded for a new trial; and we do not deem it necessary to pass upon the third and fourth assignments of error, as upon a new trial the facts proved may differ materially from those presented in the present record.

Reversed.

Note.

Streets and Highways in Territory Annexed to Municipalities.—There are but few cases dealing with streets and highways in annexed territory, and as the court states, none of them directly involve the question as to reasonableness of time in repairing defects.

City's Control over Annexed Territory.—The general rule seems to be well settled that where territory is annexed to an existing municipality, the city becomes vested with full control over the streets and highways of such annexed territory.

County Roads.—Thus, where a city annexes territory traversed by a county road, such road becomes a street of the municipality without formal recognition of that fact by the municipal council, and the city is liable for a defect therein which was allowed to continue for three years after such annexation. Louisville *v.* Brewer, 24 Ky. Law Rep. 1671, 72 S. W. Rep. 9.

Where a county road becomes a public highway by prescription (§ 6762, Rev. Stat., 1894), and is afterwards annexed with other territory by a city, such road becomes a public street, though such prescriptive title could not have been acquired by the city in the first instance. Brown *v.* Hines, 16 Ind. App. 1, 44 N. E. Rep. 655.

And under Kentucky Stat., § 3561, it was held that a turnpike road, taken into a city by an extension of its boundary, and accepted by the city, becomes a street thereof. Mackin *v.* Wilson, 45 S. W. Rep. 663.

County Bridges.—Likewise, where the extension of a city limits to the opposite bank of a river includes a county bridge, such bridge ceases to be within any county road district, and becomes part of the city street, to be repaired by the city authorities. Cascade County *v.* Great Falls, 18 Mont. 537, 46 Pac. 437.

Assessments against Abutting Owner for Improvements.—Where territory is annexed by a city, an existing public highway is impressed with the character of a street, and becomes subject to the exclusive control of the city authorities, who can build a sidewalk and assess the cost against abutting owners. McGrew *v.* Stewart, 57 Kan. 185, 32 Pac. 896.

Effect Where Improvements Are Made Prior to Annexation.—The fact that the county has made valuable improvements upon a public highway does not oust the jurisdiction of a city over its streets,

if such highway afterwards comes within the corporate limits. Almond *v.* Atlantic, etc., Ry., 108 Ga. 417, 34 S. E. 6.

Changing Grades of Annexed Streets.—A county road within territory newly annexed by a city is subject to the control and supervision of the municipal authorities like other streets of the municipality; and they may establish the grade of such road, and even remove a bridge over a railroad in order to make the crossing at grade. Wabash R. R. *v.* Defiance, 8 Ohio Civ. Dec. 703; affirmed in 52 Ohio State, 262.

Where a city, on annexing new territory, agreed not to change existing grades without the consent of abutting owners, or payment of damages according to law, the effect of such agreement was merely to put those grades upon the same legal basis as grades established by municipal authority. Corry *v.* Cincinnati, 10 Ohio Dec. Rep. 602; Hale *v.* Cincinnati, 3 Ohio Dec. 131.

Conflict between Titles Acquired by Dedication and by Prescription.—And where the right to annex such territory is acquired by dedication, the city's rights to the streets are superior to any prescriptive right in a toll company, commencing subsequent to such dedication. Covington *v.* Turnpike Co., 110 Ky. 691, 62 S. W. 687.

Pre-Existing Easements Attached to Annexed Territory.—But where territory annexed to a city is subject to a right of way for an irrigating and milling ditch, prior authority in respect to the control of its streets by the city will not be superior to such right of way, and the municipal authorities must repair and make its streets passable without interfering with the rightful and accustomed use of the ditch. Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

Reasonableness of Time—The cases fully sustain the general rule that ordinarily the reasonableness of the time in which an act was done or which was allowed to elapse before the doing of an act is a mixed question of law and fact, to be decided by the jury under the direction of the court upon the particular circumstances of the case. But it may be so short or so long that the court will declare it to be reasonable or unreasonable as a matter of law. 23 Encyc. 583.

The only case at all parallel is City of Covington *v.* Diehl, 59 S. W. Rep. 492, 22 Ky. Law Rep. 955, where a defect in a city street had existed during the month of July, and up until August 13th, and the question whether the city had had a reasonable time in which to repair the street after discovering the hole, or after having a reasonable opportunity to have discovered it, was held to be one of fact, which the jury found in the affirmative.

The other cases on the subject cover a wide range, a few of which we will set out below.

On an unlimited license to cut and carry away wood, not acted upon for fifteen years, such time is unreasonable as matter of law. Gilmore *v.* Wilber, 12 Pick. 120, 22 Am. Dec. 410.

The time in which demand must be made on negotiable paper varies according to the circumstances and situation of the parties, but eight months is unreasonable as matter of law. Field *v.* Nickerson, 13 Mass. 131.

In Aymar *v.* Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538, the court held twenty-nine days to be a reasonable time in which to present a bill for acceptance, under all the circumstances of the case.

And in Robinson *v.* Ames, 20 Johns. 146, 11 Am. Dec. 259, the court held seventy-five days to be a reasonable time for such presentation where the bill had not been negotiated.

A delay of six months in avoiding an infant's deed was held not unreasonable as matter of law. Searcy *v.* Hunter, 81 Tex. 644, 26 Am. St. Rep. 839.

Where a consignor took from the 1st of March till the 22nd of April to disavow a sale contrary to instructions, it was held a question for the jury, who found the time reasonable under all the circumstances. Porter *v.* Patterson, 15 Pa. St. 229.

Where a watch is indefinitely loaned for use, and is not returned within three weeks, such time is reasonable as matter of law. Green *v.* Hollingsworth, 5 Dina (Ky.) 173, 30 Am. Dec. 680.

Where an account rendered is not objected to for twelve days, there being several posts within that time, it is unreasonable as matter of law. Wiggins *v.* Burkham, 10 Wall. 133, 19 L. Ed. 884.

From the 9th to the 20th of April was not an unreasonable time, as a matter of law, in abandoning a vessel to the underwriters. Reynold *v.* Ocean Ins. Co., 22 Pick. (Mass.) 190, 33 Am. Dec. 732.

Where a carrier took five days to identify the consignee of perishable goods, the jury found such delay unreasonable under the special circumstances. Baltimore, etc., R. R. *v.* Pumphrey, 59 Md. 390.

Where the question was whether a passenger had called for his baggage within a reasonable term, and the facts were undisputed, the court held four days delay to be unreasonable. Chicago, etc., R. R. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 263.

WRIGHT *v.* COMMONWEALTH.

June 17, 1909.

[65 S. E. 19.]

1. Statutes (§ 241*)—Construction—Penal Statutes.—Penal statutes may not be extended by construction to cases not clearly within the language employed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.* 12 Va.-W. Va. Enc. Dig. 771; 4 Id. 11.]

2. Statutes (§ 241*)—Strict Construction of Statutes.—Statutes imposing more severe punishment in cases of second or subsequent offenses do not apply to cases which may, but to cases which must, on a strict construction, come within their language.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.* 12 Va.-W. Va. Enc. Dig. 141.]

3. Indictment and Information (§ 114*)—Second and Subsequent Offenses—Prosecutions for Capital Felony—Murder in First Degree.—Code 1887, § 3905 (Code 1904, p. 2072), provides for an addition of five years to the sentence to the penitentiary in cases where it is alleged in the indictment and admitted, or found by the jury, that he had been sentenced before to a like punishment. Section 3906 pro-

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.